

Letter of Findings Number: 04-20110582
Sales Tax
For Tax Years 2008-10

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ISSUE

I. Sales Tax—Improvements to Realty.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; [45 IAC 2.2-3-9](#); [45 IAC 2.2-3-10](#); [45 IAC 2.2-3-12](#); Sales Tax Information Bulletin 60 (July 2006).

Taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation in the excavation business and has been a registered retail merchant since 2003. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected sales tax on sales of tangible personal property during the tax years 2008, 2009, and 2010. The Department therefore issued proposed assessments for sales tax and interest. Taxpayer protests that the sales in question were not taxable because the tangible personal property was transferred pursuant to lump sum contracts. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Improvements to Realty.

DISCUSSION

Taxpayer protests the imposition of sales tax on sand and gravel ("tangible personal property") it purchased and used in the course of making improvements to realty. Taxpayer states that the sand and gravel were incorporated into realty it does not own and that it paid sales tax when it purchased the sand and gravel. Also, Taxpayer states that the improvements to realty were pursuant to lump sum contracts. The Department determined that the improvements were pursuant to time and materials contracts and that Taxpayer should have charged sales tax on the sand and gravel it sold to its customers. The Department gave Taxpayer credit for the sales tax it paid when it purchased the materials. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Taxpayer protests that it is a lump sum contractor and that it uses the materials in question in the course of its work installing improvements to realty. Taxpayer therefore believes that the materials in question are exempt from sales and use taxes.

The Department refers to [45 IAC 2.2-3-9](#), which provides:

(a) A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.

(b) A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free", is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.

(c) A contractor has the burden of proof to establish exempt sale or use when construction material, which was acquired tax-free, is not subject to either the state gross retail or use tax upon disposition.

(d) Disposition subject to the state gross retail tax. **A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:**

(1) **Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges (only the gross proceeds from the sale of the construction materials are subject to tax), or**

(2) **Construction material sold over-the-counter. Over the counter sales of construction materials will be treated as exempt from the state gross retail tax only if the contractor receives a valid exemption certificate issued by the person for whom the construction is being performed or by the customer who purchases over-the-counter, or a direct pay permit issued by the customer who purchases over-the-counter.**

(e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit; or

(3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(f) A disposition under C. [subsection (e)(3) of this section] will be exempt from the use tax only if the contractor received a valid exemption certificate, not a direct pay permit, from the ultimate purchaser or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax.

(Emphasis in original).

(Emphasis added).

Next, the Department refers to [45 IAC 2.2-3-10](#), which provides:

A contractor has no further liability for either the state gross retail tax or use tax with respect to construction material acquired by the contractor in a taxable transaction, provided the contractor disposes of such property in the following manner:

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit and does not resell or transfer such property to others; or

(3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(Emphasis added).

Next, the Department refers to [45 IAC 2.2-3-12](#), which provides:

(a) Tangible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor.

(b) In order to be exempt on such purchases, the contractor must be registered as a retail merchant, must obtain an exemption certificate from the exempt organization, and must issue an exemption certificate to his supplier.

(c) Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

(d) A person making a contract for the improvement to real estate whereby the material becoming a part of the improvement and the labor are quoted as one price is liable for the payment of sales tax on the purchaser [sic.] price of all material so used.

(e) A person selling tangible personal property to be used as an improvement to real estate may enter into a completely separate contract to furnish the labor to install or construct such improvement, in which case the sales tax shall be collected and remitted by such seller on the materials sold for this purpose. Such sale of materials must be identifiable as a separate transaction from the contract for labor. The fact that the seller subsequently furnished information regarding the charges for labor and material used under a flat bid quotation shall not be considered to constitute separate transactions for labor and material.

The Department also refers to Sales Tax Information Bulletin 60 (July 2006) 20060823 Ind. Reg. 045060287NRA, as in effect during the tax years at issue (hereinafter "Information Bulletin 60"), which provided on page two:

"Time and material contract" is a contract in which all the charges for labor, construction materials, and other items are stated separately.

Information Bulletin 60 also provided on page two:

If a construction contractor purchases construction materials to be used in a time and material contract, the construction contractor is a retail merchant and may purchase the construction materials exempt from sales tax. However, the construction contractor must collect sales tax on the resale of the construction materials and remit the sales tax, unless the customer presents a properly completed ST-105 General Sales Tax Exemption Certificate.

In the course of the audit, the Department determined that Taxpayer did not have actual contracts which spelled out the terms of the work it would perform for its customers. Rather, Taxpayer had invoices which it provided to its customers, which listed the different costs which Taxpayer was charging its customers. The Department reviewed these invoices and determined that Taxpayer's invoices listed materials and labor separately and that Taxpayer was therefore acting as a time and materials contractor.

Taxpayer protested this determination and explained that it would reach an agreement with its customers prior to the commencement of any work and that the ensuing agreement would be for a single price for the whole

job. If additional materials were required after the work started, those costs would be added onto the final invoice. Also, Taxpayer states that it paid sales tax at the time it purchased the tangible personal property to be used in a particular job. Taxpayer believes that these factors show that it was a lump sum contractor and that it was not responsible for collecting sales tax from its customers on the tangible personal property used in the project.

The Department notes that Taxpayer did not simply purchase the materials and charge its customers the price it paid for the materials. Taxpayer would purchase the tangible personal property then mark it up and charge its customers the marked up price, as a retail merchant would do. Also, as explained above, Taxpayer separately stated the costs of labor and the costs of tangible personal property on its invoices. This means that Taxpayer was operating as a time and materials contractor. Therefore, under [45 IAC 2.2-3-9](#)(d), Taxpayer should have purchased the tangible personal property exempt and then charged its customers sales tax on the marked-up price. Taxpayer has not met the burden of proving the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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